In the interim, RTC's petition to modify the Open Market Plan is denied at this time. Both NYT and RTC shall not attempt to change or deviate from the existing reciprocal compensation structures contained in their respective tariffs, interconnection agreements, and incentive plans without prior Commission approval.

ADMINISTRATIVE CHANGE

In addition to the RTC Petition for Modification, several parties filed complaints or sent letters opposing NYT's action. For administrative purposes, the previously filed complaints and letters will be incorporated into this newly instituted proceeding.

The Commission orders:

1. A proceeding is hereby instituted to investigate the issues described herein.

2. Until the Commission makes a determination to change the treatment of internet traffic, both New York Telephone Company and Rochester Telephone Corp. shall continue to pay other local exchange carriers for the exchange of such traffic based upon the approved reciprocal compensation structures contained in their respective tariffs and interconnection agreements, and incentive plans.

3. Rochester Telephone Corp.'s petition for a modification of Section III.E. of the Open Market Plan is denied.

4. Interested parties shall notify the Secretary to the Commission, within ten days of the date of this order, if they intend to participate in this proceeding and wish to receive copies of comments and responses in this proceeding. Parties can fax their letter to (518) 473-2929. A list of active parties will be compiled and distributed accordingly.

5. Interested parties shall file with the Secretary to the Commission 15 copies of comments on the issues listed herein,

clearly identified by topic, and serve a copy to each party on the active parties list within 30 days of the date of this order.

6. Responding parties shall file with the Secretary to the Commission 15 copies of reply comments, clearly identified by topic, and serve a copy to each party on the active parties list within 15 days of service.

7. The substance of Rochester Telephone Corp.'s Petition for Modification of the Open Market Plan Contained in Opinion 94-25, and Cases 97-C-0895, Complaint of MFS Intelenet of New York, Inc. Against New York Telephone Company Concerning Alleged Breach of Interconnection Terms; 97-C-0918, Complaint of ACC National Telecom Corp. Against New York Telephone Company Concerning Alleged Breach of the Terms of its P.S.C. Tariff No. 914; and 97-C-0979, Complaint of Cablevision Lightpath, Inc. Against New York Telephone Company Concerning Alleged Intention to Deny Reciprocal Compensation Payments for Certain Local Traffic, are consolidated in this proceeding and the three individual complaint cases are closed.

8. Cases 93-C-0033, 93-C-0103 and 97-C-1275 are continued.

By the Commission,

(SIGNED)

JOHN C. CRARY
Secretary

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1027

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc., and US LEC of North Carolina, LLC	)))	ORDER CONCERNING RECIPROCAL COMPENSATION FOR ISP TRAFFIC

HEARD: Wednesday, December 17, 1997, at 9:30 a.m., in the Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Jo Anne Sanford, Chair, Presiding; Commissioners Ralph A. Hunt and William R. Pittman

APPEARANCES:

For BellSouth Telecommunications, Inc.:

A.S. Poval, Jr., General Counsel, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28277

Edward L. Rankin, III, BellSouth Telecommunications, Inc., 675 W. Peachtree Street, NE, Atlanta, Georgia 30375

For US LEC of North Carolina, LLC:

Joseph W. Eason, Moore & Van Allen, PLLC, Post Office Box 26507, Raleigh, North Carolina 27611

Richard M. Rindler, Swidler & Berlin, 3000 K. Street N.W., Suite 300, Washington, D.C. 20007

For CaroNet, LLC, ICG Telecom Group, Inc., Intermedia Communications, Inc., KMC Telecom, Inc., and TCG of the Carolinas, Inc.:

Henry Campen, Parker, Poe, Adams & Bernstein, 150 Fayetteville Street Mall, Suite 1400, Raleigh, North Carolina 27601

For Teleport Communications Group:

Michael A. McRae, 1133 21st Street, NW, Suite 400, Washington, D.C. 20036

For Intermedia Communications, Inc.:

Jonathan E. Canis, Kelley, Drye & Warren, 1200 19th Street NW, Suite 500, Washington, D.C. 20036

For Time Warner Communications of North Carolina, L.P.:

Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: On October 24, 1997, US LEC of North Carolina, LLC (US LEC) filed a Petition with the Commission to enforce its Interconnection Agreement with BellSouth Telecommunications Inc. (BellSouth), which was approved by the Commission on January 29, 1997. US LEC contends that BellSouth has breached the contract by failing to pay reciprocal compensation for the transport and termination of local exchange traffic from BellSouth end users that is handed off by BellSouth to US LEC for termination to US LEC local exchange end users who are information service providers (ISPs).

The Commission held an oral argument on this dispute on December 17, 1997. The following companies intervened in the proceeding in support of US LEC — Time Warner Communications of North Carolina, L.P. (Time Warner), CaroNet, LLC (CaroNet), ICG Telecom Group, Inc. (ICG), KMC Telecom, Inc. (KMC), TCG of the Carolinas, Inc. (TCG), Teleport Communications Group (Teleport), and Intermedia Communications, Inc. (Intermedia) (collectively, intervenors).

I. Relevant Provisions of Interconnection Agreement

Section I.C. of the Interconnection Agreement defines "Local Traffic" as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

The Reciprocal Compensation provision in Section IV.A. of the Interconnection Agreement states:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. The parties agree that the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section. EAS routes are those exchanges

within an exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff.

Section IV.B. of the Interconnection Agreement states:

> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein. The charges for local interconnection are to [be] billed monthly and payable quarterly after appropriate adjustments pursuant to this Agreement are made. Late payment fees, not to exceed 1% per month after the due date may be assessed, if interconnection charges are not paid within thirty (30) days of the due date.

II. Arguments of US LEC and Intervenors

US LEC and the intervenors argue that the Commission rather than the Federal Communications Commission (FCC) has jurisdiction since this is, according to US LEC, simply a contract enforcement action. All states that have had this issue presented to them have asserted jurisdiction.

US LEC and the intervenors contend that the calls at issue here are local, regardless of where and how the ISP provides the information service. US LEC cites the definition of "termination" in the Communications Standard Dictionary and that of the FCC in 47 CFR § 51.701(d).[1] Information services provided by an ISP are, moreover, wholly separate from the local exchange telecommunications service provided by US LEC. The FCC affirmed that enhanced service providers can continue to obtain services as end users under intrastate tariffs. The FCC in the Universal Service Order (USO) has also determined that Internet access consists of severable components. In sum, ISPs are not common carriers but end users who obtain requested information over a wholly separate packet-switched network.

US LEC and the intervenors note that BellSouth's position would lead to a class of calls for which no compensation would be provided. BellSouth itself charges its own ISP customers local business line rates and customers accessing ISPs within the local calling area are charged local rates. BellSouth treats the revenues as local for the purposes of separations and ARMIS reporting.

The Commission should require enforcement of negotiated contracts as a matter of sound public policy. BellSouth's position is highly anticompetitive. Considerable monies are being withheld by BellSouth. All states that have addressed this issue have rejected BellSouth's line of argument.

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[1]The FCC, for purposes of implementing the reciprocal compensation provisions of the 1996 Act, defined "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."

III. Arguments of BellSouth

BellSouth maintains that calls made by end users to ISPs do not constitute local traffic but rather are exchange access traffic that is jurisdictionally interstate. BellSouth's reasoning is that, for instance, a single Internet call may sprawl across interstate, intrastate, and even international jurisdictions, and is unseverable. The termination point, according to BellSouth, is not the ISP switch but the database or information to which the ISP provides access. Thus, ISP traffic is jurisdictionally interstate and ineligible for reciprocal compensation.

BellSouth contends that the FCC has consistently rejected attempts to partition interstate calls into jurisdictionally intrastate segments. Moreover, the FCC has not held that ISP traffic is local for the purposes of reciprocal compensation. The ISP exemption from access charges is not dispositive. It is only treatment of ISPs as end users for the purposes of the access charge system.

BellSouth further contends that sound public policy requires that ISP traffic not be subject to reciprocal compensation because the traffic is not balanced. ISPs generate large volumes of inbound calls that are much longer in duration than typical calls.

IV. Other States

A number of other states have addressed the same issue either separately or in the context of arbitration proceedings. All have ruled that such traffic is local. The states that have ruled include: Arizona, Colorado, Minnesota, Oregon, Washington, West Virginia, New York, Maryland, Connecticut, Virginia, Michigan, and Texas.

An arbitrator in Texas ruled that the traffic was interstate, but was recently reversed by the Texas Commission.

FINDINGS OF FACT

1. BellSouth Telecommunications, Inc., a corporation a duly organized and existing under the laws of the State of Georgia, is a "public utility" within the meaning of the North Carolina Public Utilities Act. BellSouth is engaged in the provision of interstate and intrastate telecommunications service, including local exchange service, under the laws of the State of North Carolina and the United States, and as such is subject to the jurisdiction of this Commission.

2. US LEC, a limited liability company organized under the laws of North Carolina, is a "competing local provider" (CLP), as defined in G.S. 62-3(7a), of local exchange and exchange access services in the State of North Carolina pursuant to a certificate issued by this Commission, and as such is subject to the jurisdiction of this Commission.

3. US LEC and BellSouth negotiated the Interconnection Agreement filed with the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the

Act). The Commission approved the Interconnection Agreement by Order dated January 29, 1997, under authority granted by Section 252(e) of the Act.

4. Section 251 of the Act obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Pursuant to the Act and the terms of their Interconnection Agreement, US LEC and BellSouth have interconnected their networks to enable an end user subscribing to US LEC's local exchange service to place calls to end users subscribing to BellSouth's local exchange service, and vice versa. Pursuant to the Act and Sections IV.A. and IV.B. of the Interconnection Agreement, BellSouth and US LEC agreed to pay reciprocal compensation to each other for telephone exchange traffic that originates on one company's network and terminates on the other's network.

5. BellSouth provides local exchange services to end-user customers, including certain business customers operating as ISPs. US LEC likewise provides local exchange services through its facilities to end-user customers, including certain business customers operating as ISPs.

6. Section I.C. of the Interconnection Agreement defines "Local Traffic" as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

7. Typically, a customer of an ISP connects to an ISP by means of a local phone call, using telephone exchange service. A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange service bearing the called telephone number.

8. BellSouth treats calls to ISPs interconnected to its network as local traffic and charges its own ISP customers local business line rates for local telephone exchange service, thereby enabling customers of BellSouth's ISP customers to connect to their ISP by making a local phone call. When a BellSouth telephone exchange service customer places a call to an ISP within the caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs.

9. The Commission has jurisdiction to interpret and enforce the provisions of interconnection agreements between telecommunication carriers and authority to hear and determine controversies concerning the interpretation and performance of such interconnection agreements under state and federal law and the terms thereof.

10. Calls that terminate within a local calling area, regardless of the identity of the end user, are local calls under Section I.C. of the Interconnection Agreement and Commission Rule R17-1, and nothing in the Interconnection Agreement or applicable law

or regulations creates a distinction pertaining to calls placed to telephone exchange service end users which happen to be ISPs.

11. BellSouth's refusal to pay reciprocal compensation for calls made by BellSouth customers to ISPs served by US LEC is inconsistent with the reciprocal compensation terms of the Interconnection Agreement and BellSouth's obligation to provide reciprocal compensation under Section 251 of the Act.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The decision-making in this case is not an easy one. Forceful arguments have been made on both sides. The central issue involves whether traffic to an ISP from a caller within a local calling area is local. US LEC and the intervenors contend that it is; BellSouth contends that it is not.

A threshold question is whether the Commission has jurisdiction to hear and determine this controversy or to grant the relief requested by US LEC. After careful consideration, the Commission concludes that it has jurisdiction to rule and finds that the ISP traffic under dispute is local and that US LEC is entitled to reciprocal compensation in accordance with the contract terms.

There are several reasons for this decision:

1. The Interconnection Agreement speaks of reciprocal compensation for local traffic. There is no exception for local traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange telephone number of the end-user ISP. Even if it is conceded, for instance, that much Internet traffic travels onward into cyberspace, it cannot be argued that all such traffic is non-local. For example, a resident of Wake County might access the Commission's web page, an undoubtedly local transaction. Neither BellSouth nor anyone else knows with precision where these calls go. It would therefore be wrong a priori to identify all ISP calls as interstate.

2. BellSouth treats calls from its own end-user customers to ISPs it serves with telephone numbers in the same local calling area as local traffic. BellSouth charges its own ISP customers local business line rates for local telephone exchange service. When a BellSouth telephone exchange service customer places a call to an ISP within that caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs. BellSouth also treats the revenues associated with the local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reporting.

In addition, BellSouth's position would also appear to be inconsistent with this Commission's decision entered on December 23, 1997, in Docket No. P-55, Sub 1083, which BellSouth supported, concerning national directory assistance. In that docket,

BellSouth conceded that the call bounced across state lines but should nevertheless be considered not an interexchange service but an adjunct to local service.

3. The FCC has not squarely addressed this issue, although it may do so in the future. While both sides presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there is nothing dispositive in the FCC rulings thus far.

4. Every state that has ruled on this matter to date has ruled that such ISP traffic is local.

IT IS, THEREFORE, ORDERED as follows:

1. That the reciprocal compensation provision contained in the Interconnection Agreement between BellSouth and US LEC is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area, and BellSouth shall bill and pay reciprocal compensation for all such calls.

2. That BellSouth is directed to immediately forward to US LEC all sums currently due together with the required late payment charges, pursuant to the terms of the Interconnection Agreement as interpreted herein, and is further directed to pay all sums coming due in the future for such traffic pursuant to the terms of the Interconnection Agreement as interpreted herein.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of February, 1998.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

mz022598.01

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

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(919) 716-6900
FAX: (919) 716-6763

August 26, 1998

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Raleigh, North Carolina 27602-0389

P-55, Sub 1027

Re: BellSouth Telecommunications v US LEC and NC Utilitites Commission
Civil Action No: 3:98 CV 170 MU

Dear Charles:

Pursuant to your request, enclosed find a copy of defendant North Carolina Utilities Commission's Response to BellSouth's Motion for Stay and Referral to FCC.

Sincerely,

James C. Gulick
Special Deputy Attorney General

Enclosure

cc: Robert Bennink (w/out attachment)

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

REPLY TO: James C. Gulick
Special Litigation
(919) 716-6900
FAX: (919) 716-6763

August 26, 1998

VIA FEDERAL EXPRESS
Honorable Frank G. Johns
Clerk, United States District Court
210 Charles R. Jonas Building, Room 218
401 West Trade Street
Charlotte, NC 28202

P-55 Sub 1027

Re: BellSouth Telecommunications v US LEC and NC Utilitites Commission
Civil Action No: 3:98 CV 170 MU

Dear Sir:

Enclosed please find an original and two copies of defendant North Carolina Utilities Commission's Response to BellSouth's Motion for Stay and Referral to FCC. Please file stamp the extra copy of the notice and return it to our office in the enclosed, self-addressed envelope.

Thank you for your attention to this matter. I am

AB
Long
Steel
Lagoa
Carpenter

Sincerely,

James C. Gulick

James C. Gulick
Special Deputy Attorney General

Enclosures

cc: All counsel of record
Robert Bennink

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:98 CV 170 MU

BELLSOUTH TELECOMMUNICATIONS, INC.
Plaintiff,
v.
US LEC OF NORTH CAROLINA, LLC, and THE NORTH CAROLINA UTILITIES COMMISSION,
Defendants.

NCUC'S RESPONSE TO BELLSOUTH'S MOTION FOR STAY AND REFERRAL TO FCC

The North Carolina Utilities Commission ("NCUC") opposes the motion of BellSouth Telecommunications, Inc., ("BellSouth") for a stay of this action and a referral to the Federal Communications Commission, ("FCC") pursuant to the doctrine of primary jurisdiction, of the "legal issues concerning the jurisdictional nature of traffic delivered to Internet Service Providers for termination on the Internet, and Competitive Local Exchange Carriers' entitlement to reciprocal compensation payments for such traffic." (Motion of Plaintiff BellSouth, p.1).

In summary, the reasons for NCUC's opposition to this motion are these:

1) This Court cannot make a primary jurisdiction referral in this case because it does not itself have subject matter jurisdiction over this action.

2) Primary jurisdiction referral in this case is inappropriate because State commissions, not the FCC, were empowered by Congress to approve and to decide questions of interpretation and enforcement of the Interconnection Agreements mandated by the Telecommunications Act.

3) Primary jurisdiction referral is inappropriate and unnecessary because the NCUC's Order below with regard to the status of calls to Internet Service Providers ("ISPs") is consistent with past and current FCC expressions concerning the nature of Internet service.

4) Stay of this action and primary jurisdiction referral to the FCC is inappropriate because the FCC has issued no notice that it is proceeding expeditiously to resolution of whether reciprocal compensation is required for calls to ISPs, although it was requested to consider the matter expeditiously more than a year ago.

5) Primary jurisdiction referral is inappropriate because uniformity in interconnection agreements regarding reciprocal compensation is not important in view of the goal of encouraging competition in the local telecommunications market.

1. Stay And Referral Not Appropriate Because This Court Does Not Have Jurisdiction Over The Subject Matter

This court cannot properly make a primary jurisdiction referral of this matter to the FCC because this Court itself does not have jurisdiction over the subject matter. The doctrine of primary jurisdiction has been summarized by the Supreme Court as follows:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . 'Primary jurisdiction,' . . . [in contrast to exhaustion], applies *where a claim is originally cognizable in the courts*, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126, 132 (1956) (emphasis added); *See also, Reiter v. Cooper*, 507 U.S. 258, 268-269, 113 S. Ct. 1213, 1220,

122 L. Ed. 2d. 604, 618 (1993) ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice."); *Compare*, *The Doctrine of Primary Administrative Jurisdiction as Defined and Applied in the Supreme Court*, 38 L. Ed. 2d 799. Annot. §2 SUMMARY (1973) ("In its essence the doctrine requires that a question within the peculiar competence of a federal administrative agency should be determined by such agency either prior to the institution or during the pendency of a federal action *in which the court has jurisdiction of the subject matter* and in which the question arises." (emphasis added)).

The NCUC will not reargue its motion to dismiss for want of subject matter jurisdiction here. However, in light of the foregoing jurisprudence, it is clear that this Court cannot make a primary jurisdiction referral of this case unless it has jurisdiction over the subject matter. Consequently, this Court should not consider and rule upon BellSouth's motion for stay and referral until the Court has first decided the defendants' motions challenging its jurisdiction over the subject matter of this case.

Moreover, while the NCUC's Eleventh Amendment Immunity defense is not specifically a matter of primary jurisdiction jurisprudence, the NCUC believes that the important interests implicated by the Eleventh Amendment mean the NCUC is entitled to a ruling on its motion to dismiss on Eleventh Amendment Immunity grounds before the Court undertakes to rule on BellSouth's motion. "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 1124, 134 L. Ed. 2d. 252, 268 (1996) (citations omitted), *cert. denied sub nom Alabama v. Poarch Band of Creek Indians*, 517

U.S. 1133, 116 S. Ct. 1415, 134 L. Ed. 2d 541, *cert. denied sub nom. Poarch Band of Creek Indians v. Alabama*, 517 U.S. 1133, 116 S. Ct. 1416, 134 L. Ed. 2d 541, *and cert. denied.* 517 U.S. 1133, 116 S. Ct. 1416, 134 L. Ed. 2d 541 (1996).

2. Primary Jurisdiction Referral To The FCC Is Inappropriate Because The NCUC, Not The FCC, Was Empowered By Congress To Approve And To Decide Questions Of Interpretation And Enforcement Of The Interconnection Agreements Mandated By The Telecommunications Act.

A further element of the doctrine of primary jurisdiction is that "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed under the special competence of an administrative body." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64, 77 S. Ct. 161, 165, 1 L. Ed. 2d. 126, 132 (1956). BellSouth claims that the FCC is the agency that has special competence to decide the issue it has raised in this action. The NCUC agrees that the FCC has great authority in the area of telecommunications and certainly is entitled to judicial deference in many key areas. However, the area of telecommunications has long been subject to a dual regulatory scheme in which State commissions as well as the FCC have significant roles to play. *See, Louisiana Public Serv. Comm'n. v. FCC*, 476 U.S. 355, 106 S. Ct. 1890. 90 L. Ed. 2d 369 (1986).

Under the Telecommunications Act of 1996, Congress gave to the *State commissions*, not the FCC, the role of approving, arbitrating, interpreting and enforcing interconnection agreements between competing local exchange carriers. "The FCC itself both acknowledges that the Telecommunications Act of 1996 deals predominantly with local intrastate markets and recognizes that the obligations of incumbent LECs to provide interconnection, unbundled access, and resale are designed to increase competition in *local* telecommunications markets." *Iowa Utils. Bd. v. FCC*, 120

F.3d 753, 796, 820, n. 16 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. V. Iowa Utils. Bd.*, ___ U.S. ___, 118 S. Ct. 879, 379 L. Ed. 2d. 867 (Jan. 26, 1998).

Incumbent LECs, such as BellSouth, have the duty to negotiate interconnection agreements with requesting telecommunication carriers who wish to compete with them. 47 U.S.C.A. § 251(c)(1) and 47 U.S.C.A. § 252 (a) (1). If the parties agree, as BellSouth and US LEC did in this case, then the agreement must be presented to the *State commission* for approval. 47 U.S.C.A. § 252 (e). If, on the other hand, the parties cannot agree, with or without mediation through the State commission, then they may seek arbitration by the State commission. 47 U.S.C.A. § 252 (b). Notably, the FCC can have this role only if a State public service commission fails to exercise its authority under the Act, an eventuality that did not occur in the case at hand. *See*, 47 U.S.C.A. § 252 (e) (5).[1]

Last year the Eighth Circuit Court of Appeals noted the limitations of the scope of the FCC's role under the Act:

> Indeed, subsection 252(c)(2) requires a *state commission* to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Meanwhile, subsection 252(d), entitled "Pricing standards," lists the requirements that the *state commissions* must meet in making their determinations of the appropriate rates for interconnection, unbundled access, resale, and transport and termination of traffic. 47 U.S.C.A. § 252(d)(1)-(3).

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[1] (5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

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> Nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access. and resale, and the transport and termination of telecommunications traffic.

Iowa Utilities Bd., 120 F.3d at 794. The Eighth Circuit in *Iowa Utilities Bd.* went on to say, "[e]ven a traditional analysis of the interstate/intrastatequality of the local competition provisions of the Act reveals that these functions (i.e., interconnection, unbundled access, resale, and transport and termination of traffic) are fundamentally intrastate in character." *Id.*, 120 F.3d at 799.

The Eighth Circuit held that the FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in that section where Congress expressly called for the FCC's participation: subsections 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory conditions on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). *Id.*, 120 F.3d at 794, n. 10, 806.

Based on these reasons among others, the Eighth Circuit Court of Appeals, "[h]aving concluded that the FCC lacks jurisdiction to issue the pricing rules, [vacated] the FCC's pricing rules." *Id* at 800.[2] Among the rules that were vacated was 47 C.F.R. § 51.701, entitled "Scope of transport and termination pricing rules." Among the terms which § 51.701 purported to define were

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[2] "The pricing rules refer to 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which [the Eighth Circuit] found to be a legitimate interim rate for interstate access charges . . . 51.601-51.611 (inclusive), 51.701-51.717 (inclusive)." *Iowa Utilities Bd.*, 120 F.3d at 820, n. 21 (citations omitted). Attached as Appendix A is a list of titles of these regulations and, following that, the text of the stricken regulations.

"[l]ocal telecommunication traffic", "[t]ermination", and "[r]eciprocal compensation." 47 C.F.R. § 51.701(b), (d) and (e).

However, the Eighth Circuit's opinion went further. In its First Report and Order,[3] the FCC had claimed that its general authority to hear complaints under 47 U.S.C. § 208 empowered it to review interconnection agreements approved by State commissions under the Act and to enforce the terms of such agreements as well as the actual provisions contained in sections 251 and 252 of the Act. The Eighth Circuit disagreed:

> The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act. Instead, subsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations.

Iowa Utilities Bd., 120 F.3d at 803.[4] The Circuit Court rejected the view that FCC review was *also* possible.

> We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act. Additionally, the complete absence of any reference to section 208 in the Act bolsters our conclusion that *Congress did not intend to allow the FCC to review the decisions of state commissions.*

Id. at 804 (emphasis added). BellSouth's proposed referral, in essence, would have this Court give the FCC the jurisdiction to review a State commission's rulings that it was denied by Congress.

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (1996) (*Local Competition Order*).

[4] The NCUC has contended in its motion to dismiss that the Act limits even this federal district court review to approval or disapproval of agreements, as distinguished from enforcement decisions.

Had Congress intended to give all decisions regarding interconnection agreements to the FCC, it would have done so. Rather, it clearly signaled its preference and intent to reserve to the State commissions the authority to resolve disputes regarding the interconnection agreements between local competitors.[5]

Consequently, even if it is ultimately determined that this Court has jurisdiction over the subject matter, there is no basis for this court to defer to the FCC where Congress has placed administrative decision-making regarding these agreement in the hands of the State commissions, in this case the NCUC.

3. The NCUC's Order Below With Regard To The Status Of Calls To Internet Service Providers Is Consistent With Past And Current FCC Expressions Concerning The Nature Of Internet Service

While the FCC has indicated that it has not reached its own ultimate conclusion about reciprocal compensation for calls to ISPs,[6] the resolution that the NCUC reached in this case is entirely consistent with the decisions the FCC has rendered heretofore relating to Internet traffic. For example, only last week the Eighth Circuit had the opportunity to address challenges, by BellSouth, among others, to the FCC's decision, in *In re Access Charge Reform; Price Cap*

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[5] It is worthwhile noting here the following statement by the FCC itself, "[T]o the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, *incumbent LECs may address their concerns to state regulators.*" *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158, 12 FCC Rcd 27 15982, ¶ 346 (rel. May 16, 1997) (emphasis supplied).

[6] *See*, Memorandum of the Federal Communications Commission as *Amicus Curiae*, in *Southwestern Bell Telephone Company v. Public Util. Comm'n*, No. MO-98-CA-43 (W.D. Tex.) (filed July 6, 1998) attached as Exhibit 1 to BellSouth's Motion for Primary Jurisdiction Referral in this case.

Performance Review for Local Exchange Carriers: Transport Rate Structure and Pricing; End User Common Line Charges. First Report and Order CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158, 12 FCC Rcd 27 15982 (rel. May 16, 1997), (the "Order"), to continue to exempt ISPs from the duty to pay "interstate access charges." Just as in the case at bar, before the Eighth Circuit BellSouth, among other parties, argued that " '[t]here is no question' that ISPs, like IXCs, use the local network to provide *interstate services*."[7] *Southwestern Bell Telephone Company v. FCC*, 1998 WL 485387, at * 9 (8th Cir. Aug. 19, 1998) (emphasis supplied).[8] The Eighth Circuit disagreed. It noted, *inter alia*, that "the FCC has maintained the same position for the past fourteen years, refusing to permit the assessment of interstate access charges on ISPs", and concluded that "[t]he FCC has made a rational choice regarding the treatment of ISPs from a number of alternatives that are each imperfect." *Id.*, at * 8, 9. The following discussion by the Court is particularly illuminating:

> We disagree with the petitioners' characterization of the manner in which ISPs utilize the local network and thereby generate interstate costs susceptible to FCC regulation.... Contrary to the petitioners' assertions, there is some disagreement as to the manner in which ISPs make use of the local network. As the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). ***Consequently, the FCC has determined that the facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic.*** FCC Brief at 79. ***Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate, see id.*** (noting that at least some ISP services are purely intrastate and not susceptible to FCC regulation), ***the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC*** (which has been increased in the Order to cover a greater proportion of interstate allocated loop costs), ***but not to pay the per-minute interstate access charge.*** The states are free to

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[7] An IXC is a long-distance carrier.

[8] A copy of this opinion is attached as Appendix B.

> assess intrastate tariffs as they see fit. In these circumstances, we cannot say that the FCC has shirked its responsibility to regulate interstate telecommunications, nor can we conclude that it has directed the States to inflate intrastate tariffs to cover otherwise unrecoverable interstate costs, thereby exceeding its statutory authority.

Southwestern Bell, at * 10 (emphasis supplied). The Court also observed that

> ISPs subscribe to LEC facilities in order to receive *local calls* from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

Id, at *29, n. 9 (emphasis supplied). In addition, the Court noted the FCC's position that "ISPs, which are classified as end users, 'may purchase services from incumbent LECs under the same intrastate tariffs available to end users,' without paying equitable rates to compensate LECs for the increased costs associated with the services provided." *Id.*, at *9 (quoting the Order, ¶ 342).

In 1997, the FCC published a Fact Sheet for the public that it published on the Internet.[9] The following questions and answers are part of that Fact Sheet:

> Q: How does the FCC regulate the rates that local telephone companies charge to ISPs?
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> A: ISPs purchase local phone lines so that customers can call them. Under FCC rules, enhanced service providers ISPs [*sic*] are considered "end users" when they purchase services from local telephone companies. Thus, ISPs pay the same rates as any other business customer, and these rates are set separately in each state. By contrast, long-distance companies are considered "carriers," and they pay interstate access charges regulated by the FCC.
>
> Q: How are access charges different from the rates ISPs pay now?
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> A: Today, ISPs typically purchase "business lines" from local phone companies. Business lines usually include a flat monthly charge, and a per-minute charge for making outgoing calls. Because ISPs receive calls from their subscribers rather than

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[9] A copy of the Fact Sheet is attached hereto as Appendix C. It can be found on the Internet at this address: http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/index3.html

> making outgoing calls, ISPs generally do not pay any per-minute charges for their lines, which is one reason many ISPs do not charge per-minute rates for Internet access. Access charges, by contrast, include per-minute fees for both outgoing and incoming calls. The rate levels of interstate access charges are also in many cases higher than the flat business line rates ISPs pay today.

FCC, *FACT Sheet*, at 2 (Feb. 1997).

On numerous occasions the FCC has in fact noted that information services, which include Internet services, and which used to be referred to as "enhanced services," are not "telecommunications services." *See, e.g., Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking*, ___FCC Rcd. ____, 1998 FCC LEXIS 1002, ¶¶ 45, 46, 71, 72 (1998); *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21,905 (1996), *aff'd, Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), ¶ 102.

The FCC has continued to express such views. Note for example the following statements by the FCC in *In the Matter of Federal-State Joint Board on Universal Service* (Report to Congress), CC Docket No. 96-45 (adopted April 10, 1998; rel. April 10, 1998):

> 39. . . . We find, however, that in defining "telecommunications" and "information services," Congress built upon the MFJ and the Commission's prior deregulatory actions in Computer II. After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers telecommunications. By contrast, when an entity offers transmission incorporating the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information, it does not offer telecommunications. Rather, it offers an "information service" even though it uses telecommunications to

> do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.
>
> ***
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> 43. . . . Information service providers, the Report explained, "do not 'provide' telecommunications services; they are users of telecommunications services." . . . We believe that these statements make explicit the intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications regulation.
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> ***
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> 73. We find that Internet access services are appropriately classed as information, rather than telecommunications, services. . . .
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> ***
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> 81. . . . Internet access providers, typically, own no telecommunications facilities. . . . Since 1980, we have classed such entities as enhanced service providers. We conclude that, under the 1996 Act, they are appropriately classed as information service providers.

As a consequence, ISPs are not telecommunications carriers, they are telecommunications users. For this reason, it has been appropriate to view the telecommunication by an Internet subscriber as terminating with his local call to his ISP.

4. The FCC Has Issued No Notice That It Is Proceeding Expeditiously To Resolution Of Whether Reciprocal Compensation Is Required For Calls To ISPs, Although It Was Requested To Consider The Matter Expeditiously More Than A Year Ago

BellSouth notes in its brief the *Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, DA 97-1399 (rel. July 2, 1997), as well as the FCC's *Amicus* brief filed in the Texas case, stating that the FCC had not yet decided whether calls to ISP for Internet connection constituted local traffic for which reciprocal compensation is required.

On August 17. 1998, the FCC issued a further notice on this subject, *Ex Parte Procedures Regarding Requests for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, DA 98-1641, CC Docket No. 96-98 (rel. Aug.t 17, 1998).[10] In this notice, the FCC noted that the pleading cycle on ALTS's letter closed on July 31, 1997, and that on July 2, 1998, ALTS filed a letter with the Bureau withdrawing its request for clarification that section 251(b)(5)[11] of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is applicable to traffic destined for information service providers. The FCC went on to invite further *ex parte* presentations regarding the applicability of reciprocal compensation to traffic bound for information service providers in reference to the *Local Competition* proceeding, CC Docket No. 96-98, which includes the record developed in CCB/CPD 97-30.

What is conspicuously absent from this notice is the statement that the FCC intends to proceed expeditiously to arrive at a conclusion to the issue, even though it has been requested to make such a decision more than a year ago. Under this circumstance there is no particular reason to believe that the FCC has the intention to "resolve" the issue BellSouth wishes this Court to refer to it in the short term. This slowness to act should not be viewed as a dereliction of duty by the FCC. Premature resolution could stifle the "vibrant competition" in information services that has so spurred its growth. As the FCC itself noted in *In the Matter of Federal-State Joint Board on*

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[10] A copy of this Notice is attached hereto as Appendix D.

[11] A copy of this letter is attached as Appendix E.

Universal Service (Report to Congress), CC Docket No. 96-45 (adopted April 10, 1998; rel. April 10, 1998):

> 82. Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as "telecommunications." We have already described some of our concerns about the classification of information service providers generally as telecommunications carriers. Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.

At the same time, because of the rapid changes taking place, the FCC does not want to foreclose from consideration the possibility that certain types of Internet usage may constitute telecommunications that would be subject to regulation under the Telecommunications Act. *See*, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶¶ 780, 788, 789 (1997). Moreover, as has been argued above, it is clear that the FCC's view of the nature of Internet traffic is that it is "jurisdictionally mixed," not jurisdictionally interstate as BellSouth argues, and it appears likely that the FCC has also wanted to avoid impermissibly regulating intrastate communications. Consequently, it has apparently chosen to follow the issue and receive comments on it without seeking to jump to conclusions about its nature.

The State commissions collectively, at a summer meeting of the National Association of Regulatory Commissioners ("NARUC"), passed a resolution[12] within the last month specifically asserting that "reciprocal compensation arrangements, including those for ISPs, are subject to State

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[12] A copy of the resolution is attached as Appendix F